Nyaga v Muriuki (Suing as Legal Representative of Frankline Muthamia Koome - DCD) (Civil Appeal E035 of 2023) [2024] KEHC 5252 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5252 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E035 OF 2023

LM NJUGUNA, J

APRIL 24, 2024

BETWEEN

JOHN MWANIKI NYAGA ..... APPELLANT

AND

TERRY GATWIRI MURIUKI (SUING AS LEGAL REPRESENTATIVE OF FRANKLINE MUTHAMIA KOOME - DCD) ..... RESPONDENT

(Appeal arising from the decision of Hon. Gichimu W. J. in the Senior Principal Magistrate's Court at Runyenjes Civil Case No. 93 of 2021 delivered on 20th June 2023)

JUDGMENT

1. The appeal herein has been filed vide memorandum of appeal dated 18th July 2023 wherein the appellant, being dissatisfied with the decision of the court as abovementioned, now seeks orders that the appeal be allowed with costs to the appellant, the order and decree of the trial court be set aside and the respondent's suit be dismissed with costs to the appellant.

2. This appeal is premised on the grounds that:

    a. The trial magistrate erred in law and fact by apportioning 50% liability to the appellant having found that there was no concrete evidence that the appellant caused the accident;

    b. The trial magistrate erred in law and fact by disregarding established legal precedent and thereby erroneously arriving at a wrong conclusion on quantum;

    c. The trial magistrate erred in law and fact by awarding the respondent damages of Kshs.904,800/= for pain and suffering, loss of expectation of life and special damages plus costs and interest, which award was excessive and unwarranted in light of the evidence adduced;

d. The trial magistrate erred in law and fact by approbating and reprobating having found in MCTR E018/2021 Republic v. John Mwaniki Nyaga, that the appellant did not cause the accident;

e. The trial magistrate erred in law and fact by failing to consider the appellant's submissions on liability and quantum; and

f. The judgment in the circumstances of the case was such that a manifest travesty of justice occurred therein.

3. The respondent filed a plaint dated 13th September 2021 seeking judgment against the appellant for general damages for pain and suffering, loss of expectation of life, loss of dependency and loss of consortium and servitude, special damages of Kshs.149,656/= and costs. The particulars of negligence were that the deceased was lawfully driving motor vehicle registration number KCR 103T along Ugweri-Siakago Road when the appellant so negligently, carelessly and/or recklessly drove, controlled and/or managed motor vehicle registration number KCJ 986H Nissan Note that it lost control, veered off its lane and collided with the deceased's motor vehicle and occasioned him fatal injuries.

4. The appellant filed his statement of defense in which he denied the averments made in the plaint and stated that the deceased was to blame for the accident. The matter went to hearing. PW1 was the respondent who stated that she is the spouse of the deceased and she produced a marriage certificate to prove. That she was informed by an eye witness that the appellant is the one who was to blame for the accident. That the deceased was first admitted at St. Michael Nursing Hospital for 3 days before being transferred to Kenyatta National Hospital for 1 day. That the deceased told her about the accident but she did not witness it.

5. PW2 Edwin Mureithi was the deceased's employer. He testified that the deceased was his employee for a period of 1 year and he used to earn Kshs.50,000/= per month, paid in cash and the statutory fees were not deducted from his pay. That the deceased never used to consume alcohol and that he did not have a letter or contract of employment.

6. PW3 was PC Samuel Irungu of Runyenjes Police Station. He stated that the accident was reported at the said police station on 13th January 2021 at 6PM. He stated that he visited the scene and observed that the appellant's motor vehicle had left its lane and had veered off into the other lane thereby causing the accident. That he took photographs of the scene but he did not have them in court. That a criminal case was instituted in court regarding the accident. That he could not tell if the deceased was drunk at the time of the accident and that only the doctor had this information.

7. PW4, Peter Mbogo witnessed the accident. He stated that the appellant's motor vehicle was being driven at high speed while the driver was trying to overtake and, in the process, it hit the deceased's motor vehicle. That following the impact, the deceased's motor vehicle fell in a ditch and caught fire. That he went to pull the deceased out of the burning motor vehicle but by the time he managed to remove him, the deceased was severely burned and they took him to St. Michaels Hospital then to Kenyatta National Hospital. That later on, he was informed that the deceased had succumbed to the injuries sustained from the fire caused by the accident. He blamed the appellant for the accident.

8. DW1, the appellant, stated that he was lawfully driving on his lane when he saw an oncoming lorry speeding at the sharp bend in the road. That he applied the brakes on his vehicle and swerved to avert a head-on collision but the lorry's speed was too high and so it hit his car. That following the impact, the lorry lost control and landed in a ditch, leaving his car with damage. That the deceased's speeding at the winding road speaks of his negligence and that he is to blame for the accident. He stated that the monthly salary of Kshs.50,000/= was not proved and that the claim was baseless. He stated that there

were no eye witnesses to the accident and that when the police went to the scene, they found him there and blamed him for the accident. He stated that after impact, his vehicle turned and faced the direction he was coming from since he was striving to avert a head-on collision. That the deceased managed to remove himself from the burning vehicle and he was taken to hospital by well-wishers. That there were no eye witnesses to the accident and that a crowd gathered about 5-10 minutes after the occurrence.

9. The appeal was canvassed by way of written submissions.

10. The appellant submitted that the trial magistrate erred in finding that from the evidence, it was difficult to tell who was to blame for the accident, thereby apportioning liability at 50%:50%. He relied on the case of *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2001] eKLR and urged the court to revisit the evidence. That the deceased's motor vehicle knocked the front right-hand side of his motor vehicle and dragged it onto the continuous yellow line in the middle of the road. That the deceased drove dangerously and he is liable for the accident. That medical records to show that the deceased was drunk at the time of the accident were concealed by the respondent, yet these records would have shown that the deceased was drunk and was unable to control the motor vehicle.

11. Reliance was placed on the case of *Kenya horticultural Exporters Ltd v. Julius Munguti Maweu* (2008) JELR 104134 (CA) where the Court of Appeal held that where there is proof of speeding, all other factors are immaterial and the speeding driver is held liable for the accident. He also relied on the cases of *East Produce (K) Limited v. Christopher Astiado Osiro* (2006) eKLR where the court held that the party who alleges should prove the allegations and *Abbay Abubakr & Fatuma Ali v. Marair Freight Agencies* CA 17 of 1983 where the court held that negligence can be inferred from evidence of, inter alia, condition of the road for instance corners. Further reliance was placed on the cases of *Ochieng v. Ayieko* (1985) KLR 494 where the court stated that where a defendant was acquitted in the traffic case cannot be ignored, *Miller v. Minister of pensions* (1947) 2 AllER 372 where the standard of proof in civil cases was discussed and *Cecilia Karuru Ngayu v. Barclays Bank of Kenya & Another* (2016) eKLR where the court determined when costs should be granted. He urged the court to allow the appeal.

12. The respondent submitted that in order for this court to determine liability, the eye witness (PW3) account should be considered. That the fact that the appellant was acquitted of a traffic offence does not hinder this court from reexamining the evidence and making its own finding and that in any event, there was no evidence to this extent. She relied on the case of *SYT v. TA* (2019) eKLR where the Court of Appeal stated that pleadings are a mere set of unsubstantiated facts when no evidence is adduced in support of those facts. She urged this court to dismiss the appeal with costs.

13. From the foregoing, the issues for determination are the following;

    a. Whether liability was properly apportioned by the trial court; and

    b. Whether the damages awarded are just in the circumstances.

14. As a first appellate court, it is the duty of this court to examine the evidence adduced at trial afresh. This was held in the case of *Coghlan v. Cumberland (*1898) 1 Ch. 704, where the Court of Appeal (of England) stated as follows:

> " Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration

> the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

15. In this appeal, the issue of liability is so key that once the same is determined, the issue of quantum will follow with ease. Liability is a matter of fact since this court must re-look the circumstances under which the accident in question occurred. Matters of fact are determined from evidence and the burden of proof lies on the party alleging the facts to prove them. Section 107 (1) of the *Evidence Act* provides that:

> " Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

16. The evidential burden is further established under sections 109 and 112 of the *Evidence Act*. In the case of *Evans Nyakwana v. Cleophas Bwana Ongaro* (2015) eKLR the evidential burden was discussed and the court stated that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

17. The standard of proof in civil cases such as this one is on a balance of probabilities. In the case of *Miller v. Minister of Pensions* (1947) 2 All ER 372 (*supra*) discussing the burden of proof the court had this to say;-

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

18. On to the evidence, PW4 and DW1 are the 2 witnesses who seem to have witnessed the accident. PW4 stated that on the day of the accident, he was at Ithatha area along the Ugweri-Siakago Road when he saw motor vehicle KCR 103T which was being driven by the deceased on the left side of the road while motor vehicle registration number KCJ 986H was on the right side of the road and it was being driven at high speed while overtaking. That in the process of overtaking, the motor vehicle registration number KCJ 986H, being on the oncoming vehicles' lane, hit the deceased's motor vehicle which lost control and landed in a ditch then it caught fire. That PW4 ran to the scene of the accident and tried

to remove the deceased from the motor vehicle but by the time he was being removed, he was severely burned and was taken to hospital.

19. DW1 stated that he was driving along the said road when the motor vehicle being driven by the deceased suddenly appeared on his lane. That he tried to brake but the speed of the deceased's vehicle was too high and so there was a collision. That he tried to swerve in order to avert a head-on collision but the deceased's motor vehicle still hit his motor vehicle and dragged it some distance towards the opposite lane. That the deceased's motor vehicle lost control, rolled and landed into a ditch. That there was a sharp bend in the road at the scene of the accident.

20. PW1 stated that the deceased told her about the accident before he died. PW3 stated that when he went to the scene, he blamed the driver of motor vehicle registration number KCJ 986H for the accident since he left his lane and went onto the oncoming lane. That he took photographs of the scene but the same were not produced as evidence. Looking at the evidence, the trial court relied on the case of *Hussein Omar Farah v. Lento Agencies* (2006) eKLR where it was held that where there is not concrete evidence, both drivers are to blame. He therefore apportioned liability equally between the parties.

21. In my view and given the circumstances, I do agree with this finding. From the evidence, both drivers are to blame. In the case o*f Khambi and Another vs. Mahithi and Another* [1968] EA 70, it was held that:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

22. Looking at the evidence on record, it is my considered view that the apportionment of liability at 50%:50% is fair.

23. On the second issue of quantum, the appellant challenged the award of damages in the sum of Kshs.908,800/= by the trial court. The damages were broken down as follows; general damages for pain and suffering of Kshs.100,000/=, loss of expectation of life, Kshs.120,000/=, loss of dependency Kshs.1,500,000/= and special damages of Kshs.89,600/=. 50% contribution was applied to the sum.

24. On general damages for pain and suffering and loss of expectation of life, PW1 stated that the deceased was admitted for 3 days at St. Michael Hospital and 1 day at Kenyatta National Hospital before he succumbed to the injuries from the accident. That the deceased died 4 days after the accident and the cause of death was complication from burns and blunt head trauma. Under these heads, the awards of the trial magistrate is fair and just. In the case of *Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR, the court observed:

> "The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

25. Further, regarding damages for loss of expectation of life, the court stated thus in the case of *Benham vs Gambling*, (1941) AC 157:

> " In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects."

26. On the general damages for loss of dependency, PW1 stated that the deceased was employed and he was earning Kshs.50,000/= per month. PW2, the deceased's employer stated the same and added that the deceased was not issued with a letter or contract of employment. He also stated that the deceased's salary was paid in cash without any statutory deductions. PW1 also stated that the deceased died at 32 years old leaving behind a 5-year-old child. The trial court awarded a global sum of Kshs.1,500,000/= stating that the multiplier method is not applicable since there was no proof of earnings. He relied on the case of *Samuel Nyaga Ukavi v. Jamlick Nyaga Namu*, Embu Civil Appeal No. 27 of 2022.

27. Given the testimonies to show that the deceased was employed, application of the multiplier method is farfetched, leading the trial magistrate to apply a global sum. When the circumstances of the case do not permit application of the multiplier method, it is just for the court to abandon the method. This was held in the case of *Albert Odawa v. Gichumu Githenji* (2007) eKLR, where the court made the following observation;

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

28. PW1 and PW2 both named a figure but the figure cannot be substantiated in any way. In the case of *John Kipkemboi & Another v. Morris Kedolo* (2019) eKLR the court held that damages should not be too high or too low and at the same time, they should not be used as a means to enrich parties to a suit. The court encouraged application of awards that are comparable to similar decided cases. In the case of Stanwel Holdings Limited & another v Racheal Haluku Emanuel & another [2020] eKLR, the appellate court reduced global sum of Kshs.2,000,000/= to Kshs.1,000,000/= where the deceased was 23 years old who died without dependants. In this case, the deceased is survived by a wife and a child of tender years. I find the award of the trial court to be modest and fair under this head.

29. When it comes to special damages, the same must be specifically pleaded and proved. The respondent produced receipts of a total of Kshs.56,900/= and the trial magistrate rightly pointed this out.

However, he added Kshs.30,000/= as funeral expenses but the same were not proved. In in the case of *Maritim & Another v. Anjere* (1990-1994) EA 312 at 316 it was held:

> " It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."

30. Therefore, in the end, I find that the appeal partially succeeds. The findings of the trial court on liability and general damages both under the *Fatal Accidents Act* and the *Law Reform Act* are hereby upheld. The award of the trial magistrate on special damages is hereby set aside and substituted with an award of Kshs.59,600/=.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF APRIL, 2024.

L. NJUGUNA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

..... for the Appellant

..... for the Respondent